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No. 86-654

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NELSON GONZALEZ PEREZ, *et al.*,

Appellants,

VS.

THE PEOPLE OF PUERTO RICO,

Appellees.

MOTION TO DISMISS

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November 19, 1986

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QUESTIONS PRESENTED

Whether this Honorable Court has jurisdiction, to review the judgment of the Supreme Court of Puerto Rico issued in this case, either on appeal or certiorari, when:

1. The alleged federal question raised by appellants was not properly or timely presented before the Supreme Court of Puerto Rico and was not addressed by that court, since it was raised for the first time in the Jurisdictional Statement filed in this Court.

2. The judgment appealed from is not a "final judgment" under 28 U.S.C. 1258 since it is an interlocutory decision on a question of Puerto Rican law which requires the further proceedings in the case, including a *trial on the merits*, to go forward.

3. The question presented by appellants that the construction by the Supreme Court of Puerto Rico of the local perjury statute to include "legislative bodies" in the word "body" contained in the text, violates the Due Process and Ex Post Facto Clauses of the Constitution is not a substantial federal question.

PARTIES TO PROCEEDINGS BELOW

The parties before the Supreme Court of Puerto Rico: (1) Nelson González Pérez, Angel Pérez Casillas, Jaime Quiles Hernández, Rafael Moreno Morales, Juan Bruno González, Rafael Torres Marrero, José Ríos Polanco, Nazario Mateo Espada, Carlos Santiago Borrero and William Colón Berríos, appellants herein (2) the People of Puerto Rico, represented by the office of the Independent Special Prosecutor, appellee herein.

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Appellants,

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MOTION TO DISMISS

Pursuant to Rule 16.1 the appellee, the People of Puerto Rico moves to dismiss the appeal filed by appellants for lack of jurisdiction of this Court to review the judgment of the Supreme Court of Puerto Rico.

COMMONWEALTH STATUTORY PROVISIONS INVOLVED

Articles 33 and 34 of the Political Code, 2 L.P.R.A. 153 and 154, as amended in 1955, provide that in case any person fails to appear or testify before a Committee of the Commonwealth Legislature he shall be guilty of a misdemeanor entailing a penalty of not more than one thousand ($1,000) dollars or imprisonment in jail for not more than twelve (12) months. When such an event occurs Article 34 requires that

the President of the Senate or the Speaker of the House certify the facts to the Secretary of Justice "whose duty it shall be to file the pertinent charges before the Superior Court of Puerto Rico." Article 34(2) declares that the "same procedure shall be followed" in case of a perjured witness before the Legislature or its Committees and that upon conviction shall be subject to the penalties specified in article 33.

Section 225 of the Puerto Rico Penal Code of *1974*, 33 L.P.R.A. 4421 *defines* the offense of perjury and establishes the penalties. It provides that "every person who having taken an oath that he will testify, declare, depose or certify truly before any competent court, *body*, official or person, in any of the cases or proceedings in which such an oath may be administered by law, states as true any essential fact which he knows to be false or makes an unqualified statement of an essential fact which he does not know to be true, shall be punished by imprisonment for a fixed term of six (6) years. Perjury shall also be incurred, by any person who, under the circumstances established in the preceding paragraph, gives two or more testimonies, declarations, depositions or certifications which are irreconcilable with each other. In this case, it shall be unnecessary to establish the truth or falsehood of the facts involved."

The Supreme Court of Puerto Rico interpreted the word "body" in the quoted text to include "legislatives bodies" thereby making possible appellants prosecution under Section 225 of the Penal Code.

STATEMENT OF THE CASE

The appeal docketed herein is the latest salvo in a prolonged legal battle, stemming from the assassi-

nation by Puerto Rican police on July 25, 1978 of two young advocates of independence for Puerto Rico.[1] The events occurred on a remote mountain in rural Puerto Rico, Cerro Maravilla, where the deceased were led by an undercover agent of the Puerto Rico police, presumably, to commit acts of terrorism.

The Governor of Puerto Rico in 1978, Carlos Romero Barceló promptly labeled the policemen present at Cerro Maravilla "heroes" and two quick, successive "probes" by the Puerto Rico Department of Justice absolved them of all responsibility and held that they acted in self-defense. Two equally incomplete investigations by the United States Department of Justice reached the same results.

Unconvinced by the results of these probes and alarmed by their unprofessionalism and by the egregious contradictions in the testimonies of ocular witnesses, the Puerto Rico Senate decided to launch its own investigation of the matter. The Judiciary Committee of the Senate promptly hired an experienced

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[1] See e.g. *In Re San Juan Star* 662 F.2d 108 (1st Cir. 1981); *Colón Berríos* v. *Hernández Agosto,* 716 F.2d 85 (1st Cir. 1983); *Hernández Agosto* v. *Carlos Romero Barceló,* 748 F.2d 1 (1st Cir. 1984). The opinions of the Supreme Court of Puerto Rico related to the so-called Cerro Maravilla case, apart from the judgment herein appealed from include the following: *Soto* v. *Srio. de Justicia,* 112 D.P.R. 477 (1982); *Peña Clos* v. *Cartagena,* 114 D.P.R. 576 (1983); *Romero Barceló* v. *Hernández Agosto,* 115 D.P.R. 368 (1984).

Also, this is the third time that this Court has been asked to review or stay a decision of a lower court related to the Cerro Maravilla: See, *Corchado Juarbe* v. *Aponte Pérez,* No. 84-373, *cert. denied* 105 S.Ct. 331 (1984); *Romero Barceló* v. *Hernández Agosto,* No. A-316 application for a Stay denied 105 S.Ct. 318 (1984).

investigator, who for more than a year labored quietly but tenaciously, interviewing witnesses, gathering evidence and reviewing the reports of the four previous local and federal probes. Thereafter, the results of his investigation were presented to the Committee, via televised hearings. For a judicial recognition of the impact of these hearings on the Puerto Rico public opinion, see *Colón Berríos* v. *Hernández Agosto*, 716 F.2d 85, 86 (1st Cir. 1983).

The Senate investigation completely destroyed the conclusions of the four official probes. Relying on the testimony of ocular witnesses whom the previous local and federal investigators had slighted or disbelieved, of expert witnesses and of three policemen who participated in the Cerro Maravilla stake-out and testified under immunity, the Senate proved to all who wanted to see and hear that the policemen in Cerro Maravilla had apprehended the young men, beat them up and executed them by firing squad while the victims knelt, handcuffed. The investigation, moreover, showed conclusively that there had been a cover-up at the local level and raised the distinct possibility of cooperation by federal personnel in the cover-up. All of the appellants herein testified before the Judiciary Committee during the course of the Senate investigation.

The Senate investigation was so successful that the federal government launched a third investigation which culminated in criminal indictments against ten policemen who were active participants in the Cerro Maravilla operation. These policemen have been convicted of *perjury* in depositions taken in federal proceedings and most are at present serving jail sentences. The following federally convicted felons: Rafael Marrero Morales, Nelson González Pérez, An-

gel Pérez Casillas, Jaime Quiles Hernández, Rafael Torres Marrero, Juan Bruno González, William Colón Berríos, José Ríos Polanco and Nazario Mateo Espada are all appellants in this case.

In 1985 the Puerto Rican Legislature passed a Bill, Law No. 1 of January 18, 1985, creating the office of Independent Special Prosecutor and granting it full, exclusive and absolutely independent authority to prosecute any person who has committed any crime related to the events of Cerro Maravilla. Appellants herein had been charged with murder and perjury before the office of the Special Prosecutor was created. Subsequently the Special Prosecutor amended the murder and perjury charges. See Appellants Appendix 14. The perjury was allegedly committed by appellants in testimony given before the Judiciary Committee of the Senate of Puerto Rico. A motion to dismiss the charge for perjury, based on the argument that the applicable statute was article 4 and 5 of the Political Code instead of Section 225 of the Penal Code, was granted by the trial court and finally denied by the Supreme Court of Puerto Rico in the Judgment appealed from.

These are the facts which gave rise to the instant suit. As we can see, appellant's statement that "on July 25, 1978 two young men. . . members of a terrorist group died in a confrontation with police as they were about to carry terrorists acts. . ." is wholly misleading. See Jurisdictional Statement p.4. Although appellants presumably have their own version of what happened at Cerro Maravilla and could presumably prevail at trial, the Commonwealth of Puerto Rico through the office of Independent Special Pros-

ecutor has instituted criminal charges of perjury against appellants.

ARGUMENT

1. This Court has no jurisdiction on appeal under 28 U.S.C. 1258(2) when the validity of a Commonwealth statute has not been "drawn in question" as being repugnant to the Constitution or Laws of the United States and there has been no decision "in favor of its validity."

Under 28 U.S.C. 1258(2) final judgments of the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by this Court on appeal where "is drawn in question the validity of a statute of the Commonwealth of Puerto Rico on the ground of its being repugnant to the Constitution, treaties, or laws of the United States and the decision is in favor of its validity." As appellants themselves admit, the alleged federal question presented in this case was not presented before the trial court or the Supreme Court of Puerto Rico, but was raised for the first time in the Jurisdictional Statement. See Jurisdictional Statement, p. 6. In these circumstances it is impossible to comply with the requirements of 28 U.S.C. 1258(2). Since no federal question was presented to the Supreme Court of Puerto Rico, no statute of the Commonwealth could have been drawn in question as repugnant to the Constitution or laws of the United States and there could be no decision in favor of its validity.

2. This Court has no jurisdiction to review the judgment of the Supreme Court of Puerto Rico, either on appeal or certiorari, for the following reasons:

a) The alleged federal question raised by appellants was not properly or timely presented before the Supreme Court of Puerto Rico and was not addressed by that Court.

In order for this Court to have jurisdiction over a federal question raised on appeal or certiorari, the question must have been properly presented in the state court proceedings. *Cardinale* v. *Louisiana,* 394 U.S. 437, 439 (1969); *Illinois* v. *Gates,* 462 U.S. 213, 218-20 (1983); 28 U.S.C. 1258(1) and (2) (on appeal a statute must have "been drawn in question"); 28 U.S.C. 1258(3) (on certiorari a right must have been "specially set up or claimed"). As we have pointed out appellants alleged federal question was first raised in the jurisdictional statement before this Court. This is, of course, too late. See, *Raley* v. *Ohio,* 360 U.S. 423, 434-36, (1959); *White River Lumber Co.* v. *Arkansas ex rel appeal gate,* 279 U.S. 692, 700 (1929); *Whitney* v. *California,* 274 U.S. 357, 362-63 (1927).

Appellants attempt to characterize the judgment below as a "surprise" decision is ludicrous. This Court has held that when the federal issue arises or is born from an unexpected or "surprise" decision of the state court and a petition for rehearing presenting the federal question is denied, the federal claims have been adequately presented and there is jurisdiction on appeal or certiorari. *Herndon* v. *Georgia,* 295 U.S. 441, 443-44 (1935); *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.,* 287 U.S. 358, 366-67 (1932); *Saunders* v. *Shaw,* 244 U.S. 317, 320 (1917). The decision of the Supreme Court of Puerto Rico in this

case was not at all unexpected and the federal issue was not born in that judgment. Appellants had been charged with a violation of Section 225 of the Penal Code for allegedly lying in testimony before the Senate Judiciary Committee. Appellants Appendix p. 14. The defense requested the dismissal of the charges on the ground that the applicable statutes were articles 33 and 34 of the Political Code. The office of the Independent Special Prosecutor countered with the argument that Section 225 was controlling because the text included perjury committed before legislative "bodies". Furthermore, argued the prosecution, articles 33 and 34 of the Political Code had been repealed by Section 225 of the Penal Code. The Supreme Court, in the judgment appealed from, merely adopted some of the constructions of the statutes urged by the Special Prosecutor. Therefore, from the very beginning appellants were on notice of the possible interpretation which was eventually adopted by the Supreme Court of Puerto Rico and of which they now complain. Appellants statements that no one "could have previously foreseen" the judgment of the court below or that the court "engaged in a construction of the state (sic) statute in an unforeseeable fashion" are patently unfounded.

If the alleged inconsistency of the construction adopted by the Commonwealth Supreme Court with federal constitutional principles had been presented to the Courts, it would have had the opportunity to consider such questions in construing the statute. Indeed one of the most powerful reasons for the existence of the jurisdictional requirement of timely and proper presentation of the federal question is that "it is important that state courts be given the first op-

portunity to consider the applicability of state statutes in light of [federal] constitutional challenge, since the statutes may be construed in a way which saves their constitutionality" *Cardinale* v. *Louisiana,* 394 U.S. 437, 439 (1969). To argue that in the circumstances of this case the federal issue need not be presented in Commonwealth courts is completely frivolous and would stand the "surprise" exception on its head.

Even if the judgment below could be considered as a surprise or unexpected decision, appellants failed to present the federal question in a petition for rehearing before the Supreme Court of Puerto Rico. If a litigant is surprised by a decision of a State Supreme Court the exception requires that the opportunity of presenting the federal issue before the State Supreme Court on a motion for rehearing be used by the aggrieved party. As Justice Blackmun wrote in concurring in the denial of certiorari in *Estate of Wilson* v. *Aiken Industries, Inc.* 439 U.S. 877, at 879:

> "It is well established that Certiorari will not be granted where a federal constitutional issue is raised here for the first time on review of a State Court decision. . . . There appears to be an exception to that rule, however, whenever the federal issue arose from an unanticipated ruling of the state Court, *the petition for rehearing presented the first opportunity to raise it, and that opportunity was seized.*"

In this case appellants did not even file a petition for rehearing before the Supreme Court of the Commonwealth of Puerto Rico. It is clear, therefore, that the alleged federal issue in this case, was not timely

and properly presented before the Commonwealth courts and this Court lacks jurisdiction over such question.

b. The judgment appealed from is not a "final judgment" under 28 U.S.C. 1258

Under section 1258 this Court has jurisdiction to review "final judgments or decrees" of the Supreme Court of the Commonwealth of Puerto Rico. In stressing the finality requirement this Court has repeatedly held that to be appealable or reviewable a judgment must "be final as an effective termination of the litigation and not of merely interlocutory or intermediate steps therein". *Market St. R. Co.* v. *Railroad Commission,* 324 U.S. 548, 551 (1945). To comply with the finality requirement a judgment has to be final not "only as to all the parties, but as to the whole subject matter and as to all the causes of action involved". *Collins* v. *Miller,* 252 U.S. 364, 370 (1920). If there are further proceedings contemplated generally the judgment has been held to be non final. *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 477 (1975); *Flynt* v. *Ohio,* 451 U.S. 619 (1981); *O'Dell* v. *Espinosa,* 456 U.S. 430 (1982).

In the case of criminal proceedings the final judgment against a defendant is generally the sentence. *Berman* v. *United States,* 302 U.S. 211, 212 (1937); *Parr* v. *United States,* 351 U.S. 513, 518 (1956). Hence, a state court judgment that merely overrules a dismissal or demurrer to an indictment, or denies a preliminary hearing, lacks the necessary finality to be reviewable by this Court. *Flynt* v. *Ohio, supra, Polakow's Realty Experts, Inc.* v. *Alabama,* 319 U.S. 336 (1943); *Arcenaux* v. *Louisiana,* 376 U.S. 336 (1964). Under these principles the judgment below is

clearly non final and non reviewable. The judgment by the Supreme Court of Puerto Rico merely overrules a dismissal of the indictment or complaint granted by the trial court. The judgment now permits the criminal proceedings against defendants, herein appellants, to go forward. Such proceedings include, at least, a trial on the merits, sentencing and appellate procedures at the Commonwealth courts.

This Court has determined, however, that there are certain circumstances in which finality should be recognized even though "there are further proceedings in the lower state courts yet to come". *Cox Broadcasting Corp.* v. *Cohen, supra,* at 477. The circumstances which justified a finding of finality were divided into four categories in *Cox Broadcasting Corp., supra,* and each category was defined.

In the first category defined in *Cox,* "are those cases in which there are further proceedings, even entire trials, yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Cox Broadcasting Corp.* v. *Cohn, supra,* at 479. Such is not the case here since further proceedings at the trial court include a trial on the merits in which appellants could prevail. The second category includes the cases "in which the federal issue finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state court proceedings." *Id.*, at 480. This category is obviously not applicable to this case for the same reason that the first is not. The third category are those cases "where the federal claim has been finally decided with further proceedings on the merits in the state courts to come, but in which later review

of the federal issue can not be had, whatever the ultimate outcome of the case". *Id.*, at 481. Obviously, it is not even arguable that the judgment involved here falls within this category. There is no rule of law or procedure in Puerto Rico which would prevent appellants herein from presenting their federal claims for review before this Court if they finally are convicted and sentenced in the criminal proceedings below.

Finally the fourth category includes those cases "where the federal issue has been finally decided in the state courts with further proceedings pending in which the parties seeking review [in the Supreme Court] might prevail on the merits on non federal grounds, thus rendering unnecessary review of the federal issue by this court, and where reversal of the state court on the federal issue will be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in the state proceedings due to come." In these circumstances, "*if a refusal immediately to review the state court decision might seriously erode federal policy, the court has entertained and decided the federal issue. . .*" *Id.*, at 482-83. It is clear that this category is also inapplicable to the judgment below, since there is no federal policy which should be eroded by denying immediate review. In *Cox Broadcasting Corp.* v. *Cohn, supra,* the court found the finality requirement satisfied, despite the fact that there were further proceedings, including a trial on merits, to be had in the state courts, because delay of review until after trial, "will leave the press in Georgia operating in the shadow of the civil and criminal sanctions of a rule

of law and a statute the constitutionality in which is in serious doubt". *Id.*, at 485-86.

On the other hand, in *Flynt* v. *Ohio, supra,* this Court refused immediate review of the judgment by the Court of Appeals of Ohio denying a motion to dismiss the criminal complaints against defendants on the ground that they had been subjected to selective and discriminatory prosecution in violation of the Equal Protection Clause of the Fourteenth Amendment. Although there was, as Justice Stevens put it, an "interest in protecting magazine publishers from being prosecuted criminally because state officials or their constituents are offended by the content of an admittedly nonobscene political cartoon", *Flynt* v. *Ohio, supra,* (Justice Stevens, dissenting) at 623-24, the Court found "no identifiable federal policy that will suffer if the state criminal proceeding goes forward". *Id.*, at 622. If in *Flynt* the Court found no identifiable federal policy that would suffer by denying immediate review, then no such policy exists here *a fortiori.* Unlike *Cox,* and even *Flynt,* where activities arguably protected by the First Amendment could be subjected to criminal sanctions and the chilling effect that such possibility necessarily implies, the temporary validity of the judgment below not even remotely implies any such consequences. There is no discernable activity protected by the First Amendment that may be affected by denying interlocutory review in this case. The alleged federal issue in this case, by its own terms, is not operative prospectively. In other words, the argument that the construction given by the Supreme Court of Puerto Rico to the perjury statutes violates the *Ex Post Facto*—Due Process Clause of the Federal Constitution, is rele-

vant only to those defendants accused of perjury committed before the judgment of the Supreme Court of Puerto Rico. Thus, there is no state statute or doctrine that would subject future activity protected by the Federal Constitution to the shadow of civil or criminal sanctions. Therefore, there can be no federal policy that is eroded by denying interlocutory review. An application of the fourth category exception in this case would really "swallow the rule". *Flynt* v. *Ohio,* 451 U.S. at 622.

In conclusion there is no final judgment in this case and this Court lacks jurisdiction on appeal or certiorari.

C. Appellants *ex post facto*-due process argument does not present a substantial federal question.

Appellants have quoted correctly a number of decisions of this Court. It is true, for example, that an *ex post facto* law has been defined by this Court as one "that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action, or that aggravates a crime or makes it greater than it was when committed." *Bouie* v. *City of Columbia,* 378 U.S. 347, 353 (1973); *Calder* v. *Bull,* 3 U.S. (3 Dall.) 386, 390 (1798). It is also true that a State Supreme Court is barred by the Due Process Clause of the Federal Constitution from achieving precisely the same result by judicial construction. If a State Court construction of a criminal statute applied retroactively is unforeseeable and unexpected "the effect is to deprive [the defendant] of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime". *Bouie* v. *City of Columbia,* supra, 378 U.S.

at 354-55. Unfortunately for appellants these principles have nothing to do with the case at bar.

As to the *ex post facto* argument it must be understood that Section 225 of the Penal Code, under which appellants were charged with perjury, was enacted by the Puerto Rico Legislature in 1974 more than eight years prior to appellants testimony before the Senate Judiciary Committee. Furthermore, the attempt by appellants to categorize this case as within the *Bouie* v. *City of Columbia* doctrine, is completely misplaced and misleading. In *Bouie* this Court held that a criminal trespass statute in South Carolina, which by its terms prohibited only "entry upon the lands of another . . . after notice from the owner . . . prohibiting such entry. . .", could not be interpreted as prohibiting also "the different act of remaining on the premises after being asked to leave". 378 US at 355. Some negroes "sit in" demonstrators had entered a drugstore which extended service to negroes at all departments except the restaurant department and took seats in the restaurant without having received any notice that that department was barred to negroes. After they refused to leave upon being asked to do so they were convicted of violating the South Carolina criminal trespass statute mentioned above. Since there was nothing in the statute to indicate that it also prohibited the act of remaining on the premises after being asked to leave, the construction by the South Carolina Supreme Court, which included such conduct within the ambit of the statute and affirmed their convictions, deprived petitioners of rights guaranteed to them by the Due Process Clause. *Id,* at 355 and 362. The doctrine of *Bouie* and its progeny is totally

inapplicable to the facts of this case for various reasons.

First, the text of the statute herein involved, gave "fair notice" to appellants that their conduct was clearly prohibited. In *Bouie,* the statute specifically prohibited an act and failed to include the conduct which was later construed to be included within the statute. In other words, it prohibited only entry after notice prohibiting such entry but it did not prohibit the different act of remaining on the premises after being asked to leave. Here, Section 225 of the Puerto Rico Penal Code stated clearly that "any person having taken an oath to testify, declare, depose or certify truly before any competent Court, *body,* official or person in any of the cases in which such an oath may be administered by law," can commit perjury if he states as true and essential fact which he knows to be false. Any reasonable person should interpret the word *body* in the text to include "legislative bodies" since they are universally recognized as having the power to require testimony by oath.

In fact the phrase "crimes against nature" is inherently more ambiguous than the phrase "body. . . in any of the cases in which such an oath may be administered by law". *Rose* v. *Locke,* 423 US 48 (1975). Yet in *Rose* v. *Locke,* supra, this Court rejected a constitutional challenge to a State Court definition of "crimes against nature" which included forced cunnilingus, even though courts had "differed widely in construing the reach of crimes against nature to cunnilingus". *Id,* at 52 to 54. This Court also held *Bouie* v. *City of Columbia* inapposite stating that in *Rose* "there was nothing to indicate, clearly or otherwise, that respondents acts were outside the

scope" of the penal statute. In light of the above it is clear that there is nothing surprising or unexpected, from a textual standpoint, about an interpretation of the word "body" in a perjury statute which includes in the definition of such word, "legislative bodies" such as a Senate and a House of Representatives.

Second, the legislative history of Section 225 of the Penal Code clearly requires the construction that the Supreme Court of Puerto Rico adopted. The Penal Reform in Puerto Rico started in 1967. The original Bill for the Penal Code defined perjury in exactly the same terms as Section 225 does today, except that it did not include the word "body" in its list of "court, official, or person", before whom perjury could be committed. It was in the Bill of 1974, which was finally passed by the Puerto Rican Legislature, that the word "body" was included in the statute. As the Supreme Court of Puerto Rico points out in the judgment below, the Executive Director of the Counsel for the Justice Reform, Mr. Antonio Negrón García (now an Associate Justice of the Supreme Court of Puerto Rico), upon appearing before the Judiciary Committee of the House of Representatives at public hearings stated that the new statute extended the possibility of perjury to any body which he interpreted to mean "any type of institutions" which has "legislative, quasi-legislative or quasi adjudicatory functions." So the Supreme Court of Puerto Rico rightly concluded that the legislative intention was that Section 225 of the Penal Code penalized perjury committed before the Legislative Assembly.

Third, there are no prior decisions or opinions of the Supreme Court of Puerto Rico interpreting Sec-

tion 225 of the Penal Code of Puerto Rico or articles 33 and 34 of the Political Code. Therefore, appellants cannot point out to any precedent of the Supreme Court of Puerto Rico in particular which could have prompted them to believe that perjury before the Senate of Puerto Rico was not covered by Section 225 of the Penal Code. *See, Rose* v. *Locke, supra,* at 53. On the contrary, besides the text and the legislative history already discussed, and sufficient in their own right to dismiss appellants contrived argument, there are other factors that prevent any claim of lack of fair notice.

Fourth, the history of perjury in the United States, affords no relief to appellants. Perjury has been consistently recognized as the most serious of several offenses designed to protect the integrity of the information on which the government will rely. Thus, it has been the pattern in the United States to grade perjury as a felony, sometimes with penalties out of proportion to the offense. *See,* R. Perkins, *Criminal Law,* 455 (2nd Edition 1969); *Model Penal Code and Commentaries* (Official Draft and Revised Comments) Section 241.1, part II (The American Law Institute, Philadelphia, PA., 1980), P.94. Indeed, the penalty for perjury has generally exceeded those provided by Section 225 of the Penal Code of Puerto Rico. *See, Model Penal Code. . .* supra, at page 141-42. Thus, perjury has been almost unanimously classified as a crime involving moral turpitude or *malun in se. See* Note, 43 Harvard Law Review 117 (1929). Therefore, the circumstances of this case are a far cry from those in *Bouie* v. *City of Columbia,* supra, where this Court recognized that the restaurant "sit-in" was not conduct that could "be deemed improper or immoral."

378 U.S. at 362. After all, the application of the rule against surprising construction of statutes of *Bouie* v. *City of Columbia,* should depend to a certain extent "on the moral quality of the conduct". *Id.*

Fifth, the statutes of the States have been unanimous in condemning perjury before legislative assemblies. We have not been able to find a single instance of a state where perjury before legislative assemblies has not been punishable, in most instances as a felony. See, *Model Penal Code. . .*, supra, at 126-127. The statutes have referred to false statements in "official proceedings" or "where testimony is taken", or "where making a statement is required or authorized by law" or "where an oath or affirmation is or may be required or authorized by law"; but these broad terms or phrases have never been interpreted to exclude legislative assemblies. *Id.* In *Rose* v. *Locke,* supra, at 53 this Court held that the doctrine of *Bouie,* was inapplicable on the grounds, *inter alia,* that "other jurisdictions had already reasonably construed identical statutory language" in the same manner as the Supreme Court of Tennessee. This Court rejected *Bouie* even though there were, indeed, interpretations of state supreme courts which had interpreted the same identical language in a different manner. It was sufficient that *some* jurisdictions had interpreted the statute in the same way as the Supreme Court of Tennessee. In this case no court, that we know of, has construed a general perjury penal statute to exclude false statements made before legislative assemblies.

Lastly, in light of the above, appellants argument is reduced to complaining that the Supreme Court of Puerto Rico refused to apply the canon of construc-

tion which states that special statutes prevail over general statutes, i.e. that since articles 33 and 34 of the Political Code deal with the legislature it is a special statute which should prevail over Section 225 which is the general perjury penal statute. But the canons of constructions have never been absolute rules. In particular, the canon that a special statute will prevail over a general statute when they are in conflict is valid "unless it appears that the legislature intended to make the general act controlling". See, Singer, *Sutherland Statutory Construction,* Section 51.05, Volume 2A, page 499. In other words the legislative intent has always been paramount. The rule of special acts v. general acts, has never been thought to override the intent of the legislature. The Supreme Court of Puerto Rico has long recognized the principle stated above. *Ex parte Ramos,* 63 P.R.R. 356, 359 (1938); *Pueblo* v. *López Pérez,* 106 D.P.R. 584 (1977). Further, there are other canons of construction which require that whenever two laws are contradictory the duty of the Court is to examine the circumstances to determine the real legislative purpose, *Pueblo de Puerto Rico* v. *Bou Nevárez,* 111 D.P.R. 179 (1981), and that the Court has the duty to interpret a statute in a manner that will not result in absurd or unreasonable consequences. *Mercado e Hijos* v. *Junta Azucarera,* 95 P.R.R. 831 (1968); *Esso Standard Oil* v. *A.P.P.R.,* 95 P.R.R. 754 (1968). In this case the Supreme Court of Puerto Rico rightly recognized that it would be absurd to exclude the legislature from the term "body" in the perjury statute. "Instead of recognizing the legislative powers, we would be seriously curtailing and limiting its power if we gave a different treatment to witnesses who testify under oath before a legislative body and to those who testify

in a judicial proceeding or at the hearing before an administrative agency. There is no valid or logical reason for such classification." Appellants appendix 21. On top of the clear text of the statute and the clear legislative intent, the absurdity of construing the statutes in such a way that perjury before a legislative assembly is a misdemeanor while perjury before a court or an administrative agency is a felony, is simply too much.

In sum, the text, legislative history and common sense require the construction given to the perjury statute by the Supreme Court of Puerto Rico; the history of perjury in the United States classifies it as a crime involving moral turpitude or *malun in se*; all these states have statutes penalizing perjury before legislative assemblies, most as a felony, and there were no prior decisions by the Supreme Court of Puerto Rico overruled by the judgment below. In these circumstances it is plainly frivolous to argue that the construction of the statute made by the judgment below is "so unforeseeable and surprising an interpretation" of the perjury statute as to violate the due process rule announced in the *Bouie* case. *Black* v. *Romano*, 105 S. Ct. 2254, 2263, n. 17 (1985) (Justice Marshall concurring). Appellants conduct is particularly evil and their arguments are just a pretext for evading the law.

CONCLUSION

Appellants due process claim is not a substantial federal question, the question was not timely and properly presented before the Supreme Court of Puerto Rico, and the judgment below is not a "final judgment" under the terms of 28 USC 1258.

For the reasons stated the Court should dismiss the appeal for lack of jurisdiction.

Respectfully Submitted.

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